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C O N F I D E N T I A L SECTION 01 OF 02 VIENNA 001125

SIPDIS

E.O. 12958: DECL: 09/01/2024

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SUBJECT: AUSTRIA AND THE VISA WAIVER PROGRAM: VISIT OF  
STAFFDEL NUNEZ-NETO

REF: (A) STATE 84344 (B) VIENNA 430 AND PREVIOUS

Classified By: Econ/Pol Counselor Dean Yap. Reason: 1.4(b) and (d)

11. (C) Summary. Staffdel Nunez-Neto's Aug. 27 meetings with Data Protection Office personnel revealed some positive movement in Austrian thinking about the data protection provisions of the PCSC agreement; however, serious concerns remain about the HSPD-6. With the Foreign and Interior Ministries, the GoA emphasized the utility of reaching a U.S.-EU general agreement on data protection and raised their concerns that, with the imposition of a fee, the ESTA program could acquire the functional equivalence of a visa. In both meetings, Staffdel members emphasized the commitment in Congress to protecting data for all persons affected by the PCSC and HSPD-6, the overall high standard of U.S. privacy protection, and the importance of looking at the specific provisions of these security-related agreements rather than seeking to address wide ranging concerns about differences in the two legal systems. End Summary.

Foreign and Interior Ministries  
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12. (U) A joint discussion with representatives of the Foreign and Interior ministries focused on three themes: Austria's low ESTA compliance rates; possible visa equivalence of ESTA with fees; and Austrian compliance with the new VWP requirements to share information.

13. (U) ESTA Compliance: Austrian officials suggested several possible factors behind Austria's low compliance rate, including its multiple passport regimes in circulation; the fact that most departures to the U.S. transit third countries (the Austrians say they have anecdotal evidence that large numbers of Austrians are filing their ESTA at European hub airports or, in some cases, being refused boarding); and Austrian Airlines' pre-occupation with its pending sale to Lufthansa. The U.S. side acknowledged that the different passport regimes could be causing a partial undercount, but that Austria still clearly lags other EU member states in compliance and should work with the USG, airlines, and others to bring it up. DHS VWP Director Frey, accompanying the Staffdel, said that DHS is moving to enforced compliance of ESTA and stressed that, at current compliance levels, hundreds of Austrians risk being refused boarding or entry. Frey indicated that DHS and State are committed to continuing to work with the GoA and the travel industry to increase the Austrian compliance rate.

14. (C) ESTA Visa Equivalence: Austrian Deputy Director for Travel Lux noted concerns in the EU about the introduction of an ESTA fee, explaining that the lack of a fee was a leading factor in the EU's initial determination that ESTA was not a visa. Mr. Nunez-Neto and other members of the Staffdel explained the status of legislation now pending in the Senate, emphasizing that it originated in the Commerce

Committee, and that its problematic aspects were known. They were, however, expecting it to pass and that an eventual fee between USD 10-20 would be imposed. DHS' Frey stressed the non-fee points that differentiated ESTA from a visa. The Austrians reacted skeptically, and encouraged a U.S.-EU dialogue on the issue.

¶5. (C) VWP Security: MFA Justice and Home Affairs Director Brieger reviewed recent Austrian steps to come into compliance with the 2007 security requirements. He noted the recent conclusion of an exchange of notes on lost and stolen passports and Austria's request in its April questionnaire for more detail on the U.S. data privacy regime. He affirmed that, once the U.S. reply to the questionnaire was received, the relevant GoA entities would seek a negotiating mandate for the HSPD-6 and PCSC agreements, the last elements of the 2007 U.S. legislation remaining for Austria. Both MoI and MFA representatives indicated their ministries' support for concluding the agreements. They pointed to two routes by which the USG could resolve GoA concerns: either negotiating a blanket agreement on data privacy with the EU or amending the Privacy Act to cover EU citizens. DHS' Frey indicated that the U.S. response to the questionnaire should be provided within a week.

Data Protection Office  
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¶6. (U) Eva Souhrada-Kirchmayer, Director of the Data Protection Office (DPO, part of the Federal Chancellery) outlined the structure of Austria's data protection regime,

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emphasizing its basis in constitutional provisions guaranteeing all persons "subjective rights" and access to judicial redress and an "effective remedy." The Austrian side appeared skeptical that the U.S. system, requiring first an appeal through agency channels, could do so. Moreover, they doubted that the "diplomatic" mechanisms provided for in the PCSC and HSPD-6 agreements would be adequate correctives.

Unlike the Foreign and Interior ministries, DPO representatives said they were "not insisting" on an amendment to the U.S. Privacy Act, but did say a general U.S.-EU agreement on data privacy was required. The DPO reps also raised the possibility of amending the draft HSPD-6 and PCSC texts to include language similar to that in the U.S.-EU Eurojust agreement. DHS' Frey said the U.S. would welcome the opportunity to review specific Austrian proposals in the context of a negotiation.

¶7. (C) The DPO reps then reported that, while they believed the PCSC Agreement could be relatively easy to negotiate, they had serious concerns about the HSPD-6. Because the data that would be exchanged under the HSPD-6 data comes from intelligence sources, its "level of reliability" is such that it could affect "the rule of law," they explained. Specifically, if an Austrian agency were to make a decision on the basis of information received from the U.S. that was then challenged in court, the Austrian court would not have the necessary access to the information to rule on the substance of the case. Moreover, the Schengen rules that apply to operating "discreet surveillance" systems (i.e., tracking persons without plans for specific action) would not apply to the U.S. use of data provided by Austria. There was, the DPO reps maintained, a big difference between the case-by-case sharing of data foreseen in the PCSC and the "en bloc" sharing of data (even if very limited in nature) that the HSPD-6 would establish.

Comment  
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¶8. (C) While the Austrian side continued to argue for essentially the same remedies to the problems they identified with the HSPD-6 and PCSC agreements during the March

consultations, their tone appears to have shifted somewhat. While it cannot yet be considered a breakthrough, the DPO's willingness to talk about amending the PCSC text in a negotiation is certainly a step forward. On the downside, their closer review of the two agreements appears to have created a significant new problem with regard to the HSPD-6. Embassy cannot yet judge what the next steps in this process should be. Those will depend greatly on how the Austrian agencies respond to the U.S. answer to their April questionnaire.

19. (C) The Embassy does see a potential problem in Vienna on the questions of ESTA's equivalence to a visa. Their basic view seems to be that a visa is explicit permission to present oneself at a port of entry and seek entrance into a foreign country -- with the precise form of that permission not being decisive. Austrian agencies have a very legalistic perspective and, depending on precisely how they define a visa, could be one of the more difficult EU members when this issue is discussed.

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